OFFICE OF THE ATTORNEY GENERAL
State of California

EVELLE J. YOUNGER
Attorney General

OPINION

of

EVELLE J. YOUNGER
Attorney General
ANTHONY C. JOSEPH
Deputy Attorney General

NO. SO 77/34

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THE HONORABLE JOSEPH E. BODOVITZ, EXECUTIVE DIRECTOR OF THE CALIFORNIA COASTAL COMMISSION, has requested an opinion of this office on the following questions:

1. What is the effect of the 1976 amendments[1/] to Revenue and Taxation Code section 402.1 on tax assessments of land within the coastal zone?

2. What is the effect of the rebuttable presumption established by Revenue and Taxation Code section 402.1, on tax assessments of land within the coastal zone?

3. What evidence must a tax assessor present to overcome the rebuttable presumptions concerning use restrictions on land under Revenue and Taxation Code section 402.1?

The conclusions are:

1. In the assessment of land located within the coastal zone, tax assessors must consider the effect

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1. While the opinion request referred to the 1976 amendments to Revenue and Taxation Code section 402.1, the requestor has clarified that the opinion should discuss the effect of all section 402.1 references to the coastal commissions and the Coastal Act.

upon such value of Coastal Act (Pub. Resources Code, § 30,000 et seq.) jurisdiction over development of such properties. When the issuance or denial of Coastal Act permits creates a restriction on the use of coastal zone property, the effect upon valuation of such property must be considered by the tax assessor. If the use of land is subject to development controls by local government in accordance with a certified local coastal program, the effect of any such use limitations on the value of property must be considered by tax assessors.

2. Where the use of real property is restricted, Revenue and Taxation Code section 402.1 generally precludes the use of otherwise comparable sales of land not similarly use-restricted in reaching tax assessment valuation.

3. If a tax assessor can prove by a preponderance of evidence that a use restriction will be removed from property being assessed in the predictable future, then appropriate comparable sales data may be used to establish value. Evidence to rebut the statutory presumptions of permanence of a use restriction would include the state or a regional commission's repeated removal of previously imposed limitations. Such removal may include changes in interpretations of Coastal Act policies, as evidenced by permit conditions and interpretive guidelines. Similarly, proof of repeated instances in which a local government acting under a certified local coastal program has failed to properly enforce the restrictions therein could rebut the presumption of permanence regarding use restrictions. If a tax assessor can prove by a preponderance of evidence that a use restriction will have a "demonstrably minimal effect" upon the value of the use-restricted land, an assessor may use comparable sales of nonuse-restricted property in assessing the value of the use-restricted property.

ANALYSIS

I. The Coastal Act and Section 402.1 of the Revenue and Taxation Code

The purpose of this opinion is to provide guidance to the California Coastal Commission as to tax assessors' obligations under Revenue and Taxation Code section 402.1 (hereinafter all statutory references are to the Revenue and Taxation Code unless otherwise

expressly stated) which was amended as a part of the legislation enacting the California Coastal Act. (Stats. 1976, ch. 1330, § 14.) Section 402.1 reads as follows:

> "In the assessment of land, the assessor shall consider the effect upon value of any enforceable restrictions to which the use of the land may be subjected. Such restrictions shall include, but are not limited to: (a) zoning; (b) recorded contracts with governmental agencies other than those provided for in section 422; (c) permit authority of, and permits issued by, governmental agencies exercising land use powers concurrently with local governments, including the California coastal commissions, the San Francisco Bay Conservation and Development Commission, and the Tahoe Regional Planning Agency; (d) development controls of a local government in accordance with any local coastal program certified pursuant to Division 20 (commencing with Section 30000) of the Public Resources Code; (e) environmental constraints applied to the use of land pursuant to provisions of statutes.
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> "There shall be a rebuttable presumption that restrictions will not be removed or substantially modified in the predictable future and that they will substantially equate the value of the land to the value attributable to the legally permissible use or uses.
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> "Grounds for rebutting the presumption may include but are not necessarily limited to the past history of like use restrictions in the jurisdiction in question and the similarity of sales prices for restricted and unrestricted land. The possible expiration of a restriction at a time certain shall not be conclusive evidence of the future removal or modification of the restriction unless there is no opportunity or likelihood of the continuation or renewal of the restriction, or unless a necessary party to the restriction has indicated an intent to permit its expiration at that time.
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> "In assessing land where the presumption is

unrebutted, the assessor shall not consider sales of otherwise comparable land not similarly restricted as to use as indicative of value of land under restriction, unless the restrictions have a demonstrably minimal effect upon value.

"In assessing land under an enforceable use restriction wherein the presumption of no predictable removal or substantial modification of the restriction has been rebutted, but where the restriction nevertheless retains some future life and has some effect on present value, the assessor may consider, in addition to all other legally permissible information, representative sales of comparable land not under restriction but upon which natural limitations have substantially the same effect as restrictions.

"For the purposes of this section:

"(a) 'Comparable lands' are lands which are similar to the land being valued in respect to legally permissible uses and physical attributes.

"(b) 'Representative sales information' is information from sales of a sufficient number of comparable lands to give an accurate indication of the full cash value of the land being valued.

"It is hereby declared that the purpose and intent of the Legislature in enacting this section is to provide for a method of determining whether a sufficient amount of representative sales information is availeble for land under use restriction in order to ensure the accurate assessment of such land. It is also hereby declared that the further purpose and intent of the Legislature in enacting this section and Section 1630 of the Revenue and Taxation Code is to avoid an assessment policy which, in the absence of special circumstances, considers uses for land which legally are not available to the owner and not contemplated by government, and that these sections are necessary to implement the public policy of encouraging and maintaining effective land use planning. Nothing in this statute shall be construed as requiring the

assessment of any land at less than as required by Section 401 of this code or as prohibiting the use of representative comparable sales information on land under similar restrictions when such information is available."

Section 402.1 is one of several tax assessment provisions enacted in California in an attempt to encourage and maintain effective land use planning. As stated in Dressler v. County of Alpine (1976) 64 Cal.App.3d 557, 567, fn. 5:

"The decisional guide to valuation which equates 'highest' with 'most profitable' use was evolved before the advent of legislation designed to protect open-space and environmentally restricted lands from conventional tax valuation methods. (See Cal. Const., art. XIII, § 8; Rev. & Tax Code §§ 402.1, 421-432; Gov. Code, § 51200 et seq.)"

Numerous law review articles and Opinions of the California Attorney General have discussed the body of law involving the Williamson Act and other measures designed to preclude the assumed pressure of development on lands assessed at their highest and best use. (47 Ops.Cal.Atty.Gen. 171 (1966); 51 Ops.Cal.Atty.Gen. 80 (1968); 59 Ops.Cal.Atty.Gen. 293 (1976); Bowden, Opening the Door to Open Space Control (1970) 1 Pac.L.J. 461; Mix, Restricted Use Assessment in California: Can It Fulfill Its Objectives? (1970-71) 11 Santa Clara Law 259; (1967) 55 Cal.L.Rev. 273; Land, Unraveling the Urban Fringe: A Proposal for the Implementation of Proposition Three (1967-68) 19 HastingsL.J. 421; Williamson, The Property Tax and Open Space Preservation in California: A Study of the Williamson Act (Feb. 1974) Stanford Environmental Law Society.)

Similarly, the California Coastal initiative and its successor, the California Coastal Act demonstrates the Legislature's clear concern with protecting, maintaining, enhancing, and restoring the quality of the coastal zone environment including its natural and man-made resources. (Pub. Resources Code, §§ 30001, 30001.5; CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal.App.3d 306, 333.)

The definition of use restrictions under section 402.1 expressly includes both "permit authority of, and permits issued by, . . . the California coastal commissions, . . ." Initially, it appears from the plain meaning of the

statute that the Legislature intended to require tax assessors to consider use restrictions in the assessment of land subject to the jurisdiction of either the state coastal commission or any regional coastal commissions. There is only one state commission. (Pub. Resources Code, § 30105.) Therefore, the pluralization of the word commission under section 402.1 includes the regional commissions for the duration of their existence. Further, at the time section 402.1 was amended to include actions of the coastal commissions the Coastal Initiative mandated formation of both state and regional commissions. (Stats. 1974, ch. 857.)

Assessors must consider the effect upon value of the issuance of a coastal development permit which restricts use and the permit authority of the coastal commissions in general. Examples of a value-affecting use restriction involved in the issuance of a permit might be property zoned for a "higher" use than a permitted development allowed by the state or a regional coastal commission or conditions imposing limitations on use beyond those established by local government. Where these types of permit conditions have an effect on the value of land such effect must be taken into account by the assessor.

Denials of applications for coastal permits are not expressly included within the description of use restriction under section 402.1. The contrast between a denial and a permit issuance, which is expressly included in section 402.1, is that the issuance invariably establishes the exact use of the real property involved, whereas a denial is only of the specific proposal for development, but not any other use. An applicant whose coastal permit application is denied may reapply for a substantially changed development on the same land at any time. (Cal. Admin. Code, tit. 14, § 13109.) After a six-month waiting period an applicant can reapply for the identical project. (Id.) Nevertheless, while an application for a substantially changed project on a re-application may be filed, the findings supporting a coastal permit denial may restrict specified uses on a specific parcel of land. Permit denials are thus encompassed within the general "permit authority" category of section 402.1 use restrictions. If a denial of a coastal permit causes a diminution or an increase in the value of real property this consideration must be considered in tax evaluation.

The Coastal Act excludes specified types of development from the permit provisions of said Act. (Pub.

Resources Code, § 30610.) Also, categorical exclusions and urban land area exclusions may be granted under the Coastal Act. (Pub. Resources Code, §§ 30610 subd. (d), 30610.5.) Where such exclusions are recognized or have been granted, the assessor may find that no Coastal Act use restriction under section 402.1 exists. However, if a categorical exemption or an urban land area exclusion is conditioned by limitations as to use of property subject to such exclusions, the assessor must assess such property on the basis of the use restriction's effect on value. Since the 1976 amendments to section 402.1 expressly include within the definition of use restriction "development controls of a local government in accordance with any local coastal program certified [under the Coastal Act]" assessors will have to consider a reduction in value arising from development restrictions included within local coastal programs as they are certified.

In determing the assessed valuation of real property, the tax assessor is required by section 401 to assess property at 25% of its full value. (See also Calif. Const., art. XIII, § 1.) The definition of full cash value as applied in California means:

> "[T]he amount of cash or its equivalent which property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other and both with knowledge of all of the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions upon those uses and purposes." (Emphasis added.) (Rev. & Tax Code, § 110.)

(See also De Luz Homes, Inc. v. County of San Diego (1955) 45 Cal.2d 546, 562; Bret Harte Inn, Inc. v. City and County of San Francisco (1976) 16 Cal.3d 14, 21.) The enactment of section 402.1 cannot alter the constitutional requirement that property be valued at its full value, which is the fair market value of the property unless value standard other than fair market value is prescribed by the Constitution or by a statute authorized by the Constitution. (Cal. Const., art. XIII, § 1.) What section 402.1 does require is that in determining the full value any change in value brought about by a use restriction must be considered. The constitutionality of section 402.1 has been recently affirmed. (Meyers v. County of Alameda (1977) 70 Cal.App.3d 799, 807; 47 Ops. Cal.Atty.Gen., supra, 171, 179.)

II and III. Effect of Rebuttable Presumptions Under Section 402.1 and Evidence Necessary to Rebut Such Presumptions.

An article entitled Administrative Appeal and Judicial Review of Property Tax Assessments in California--The New Look, by Kenneth A. Ehrman (1970-71) 22 Hastings L.J. 1, describes the background for the inclusion of rebuttable presumptions in section 402.1:

> "An enforceable restriction on the use of land obviously affects the value of the land. Formerly, the assessor often ignored the depressing effect of restrictions by assuming that because the restriction might be modified or lifted in the near future, it did not really affect the market value of the property as compared with otherwise similar property. The 1966 legislature imposed on the assessor the burden of proving that an enforceable restriction on use might be removed or substantially modified in the predictable future if he wished to ignore the restriction in assessing the property. Otherwise, he must value it only on the basis of the permitted uses." (Id., at pp. 17-18.)

In 1970 an article in Volume I of the Pacific Law Journal 461 states at page 500 that Revenue and Taxation Code section 402.1 contains two rebuttable presumptions. The author describes the two rebuttable presumptions as follows:

> " . . . The first is that the restriction is permanent. To overcome this presumption, the assessor must show that a pattern of rezoning has characterized the area or that historically, similar zoning restrictions have been frequently avoided or circumvented. The second presumption is that the restriction will have the effect of equating the value of the property to the value attributable to the legally permissible use. Failure of this equation will be demonstrated by 'the similarity of sales prices for restricted and unrestricted land.'"

If the rebuttable presumptions are not overcome by evidence produced by the assessor the tax assessor may not use sales of otherwise comparable land not similarly restricted as to use. (Meyers v. County of Alameda, supra, 70 Cal.App.3d 799, 807.)

In Meyers v. County of Alameda, supra, 70 Cal. App.3d at p. 805, the court held that rebuttal of the presumption of permanence of the restricted use could only be demonstrated by a preponderance of evidence showing that the restricted use would be removed or substantially modified in the predictable future. The court then stated:

> " . . . This could be demonstrated by presenting, for instance, evidence that a pattern of rezoning has characterized the jurisdiction in question, or that historically similar zoning restrictions have been frequently avoided or circumvented. . . ."

Thus, if a tax assessor proves that the state coastal commission or a regional coastal commission has repeatedly removed previously imposed coastal limitations, the presumption of permanence of use restrictions contained in section 402.1 would be rebutted. Examples of such coastal limitations would include changed interpretations of Coastal Act policies (see, ch. 3 of the Coastal Act, Pub. Resources Code, § 30.200 et seq.) as evidenced by permit conditions and interpretive guidelines of the state and regional commissions.

As to the first rebuttable presumption section 402.1 provides additional direction. The section states:

> " . . . . . .
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> " . . . The possible expiration of a restriction at a time certain shall not be conclusive evidence of the future removal or modification of the restriction unless there is no opportunity or likelihood of the continuation or renewal of the restriction, or unless a necessary party to the restriction has indicated an intent to permit its expiration at that time.
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> " . . . . . "

Generally, the use restrictions of the coastal commissions do not have specific expiration dates. However, there may be instances where restrictions such as conditions are limited as to time. Even though a use restriction is to expire at a definite time, if it is shown that there is any likelihood that the use restriction will be continued or renewed, the valuation of the affected real property must include any change in value related to the use restriction.

Further, section 402.1 provides that where the presumption of no predictable removal of the use restriction is rebutted, but there still remains a period during which the restriction will be in effect and have some effect on

present value, the assessor may consider representative sales of comparable land which although not similarly use restricted have natural limitations which have substantially the same effect as the use restriction on the subject parcel.

Section 1630 provides that a real property owner may obtain from the governing body of a local agency a statement indicating that such agency does not intend to remove or modify a use restriction in the predictable future. No equivalent provision exists for obtaining such a statement from state agencies. After certification of local coastal programs, section 1630 statements will be obtainable by persons whose property is restricted as to use on the basis of local coastal programs.

Rebuttal of the second presumption in section 402.1 again requires the assessor to prove by a preponderance of evidence that there will be a "similarity of sales prices for restricted and unrestricted land" within the area involved. Such a showing will generally be based upon sales information relating sales prices of use-restricted land to sales prices of non use-restricted land. If the evidence does not show a similarity of sales prices for restricted and unrestricted land, then the sales prices of the unrestricted land may not be considered for the purpose of valuing the use-restricted land. (Meyers v. County of Alameda, supra, 70 Cal.App.3d at p. 799.)

Evidence supporting rebuttal of either presumption must comply with section 1609 regarding evidence admitted at hearings on property tax assessments. The rationale of a decision made rebutting such presumptions must be supported by findings of fact where such is requested by parties involved in a tax assessment proceeding. (Rev. & Tax. Code, § 1611.5.)

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